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No. 94-708

In The

Supreme Court of the United States

October Term, 1994

EL DORADO PALM SPRINGS, LTD.,
a California Limited Partnership
d/b/a El Dorado Mobilehome Park,

Petitioner,

vs.

RENT REVIEW COMMISSION OF THE
CITY OF PALM SPRINGS,

Respondent,

RESIDENTS OF EL DORADO MOBILEHOME PARK,

Real Party in Interest-Respondent.

Petition For Writ Of Certiorari
To The California Court Of Appeal
Fourth Appellate District, Division Two

BRIEF OF RESPONDENT, RENT REVIEW COMMISSION OF THE CITY OF PALM SPRINGS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the October 30, 1991 rulings of the Rent Review Commission of the City of Palm Springs correcting its prior administrative rulings of October 17, 1988 to be consistent with the California "vested rights" doctrine, as announced in the decisions of the California Court of Appeal, Fourth Appellate District, Division Two, in *Palacio de Anza v. Palm Springs Rent Review Commission*, 209 Cal.App.3d 116, 257 Cal.Rptr. 121 (1989), and *El Dorado Palm Springs Limited v. Rent Review Commission*, 230 Cal.App.3d 335, 281 Cal.Rptr. 327, *review denied*, 91 Cal. LEXIS 4092 (1991), present any important question of federal law which has not been, but should be, settled by the United States Supreme Court?

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I.

ADDITIONS TO OPINIONS BELOW

In addition to the opinions included in the Appendix filed by Petitioner, included with this brief is the *full* opinion of the Court of Appeal, Fourth Appellate District,

Division Two, in the case of *El Dorado Palm Springs Limited v. Rent Review Commission*, 230 Cal.App.3d 335 (May 20, 1991), *review denied*, 1991 Cal. LEXIS 4092 (June 30, 1991) (and commonly referred to as "*El Dorado I*"), particularly those portions of that opinion that are binding on the parties herein but were not designated for publication pursuant to the applicable California Rules of Court. This document is included as Respondent's Appendix No. 1.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the uninitiated, there is a lengthy and somewhat complicated history leading to the petition before this Honorable Court. Essential to an understanding of the actions of the Rent Review Commission of the City of Palm Springs (simply the "Commission"), as well as the *rulings* of the appellate court below, much of this procedural and factual history needs to be reviewed.[1]

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[1] The Commission concurs in that portion of the Petition for Writ of Certiorari (at p. 3) which identifies the parties herein. For ease of reference, the landlord will be referred to throughout as the "Petitioner" and the Real Party in Interest will be referred to as the "Residents." However, there is no evidence in the record below to support the characterization of the mobilehome park in question as an "upscale resort," nor the implication flowing therefrom that the Residents are all affluent senior citizens.

A. Petitioner Purchases the Park.

In April, 1986, Petitioner purchased EL DORADO MOBILEHOME PARK (the "Park"). Petitioner acquired the Park for $7,360,000. This purchase was financed principally by two promissory notes: (1) a note for $5,400,000 payable to California Federal Savings, secured by a first priority deed of trust, and (2) a note for $1,960,000 payable to Century Properties Fund 7-13, secured by a second priority deed of trust.

B. Petitioner Institutes *El Dorado I*.

Concurrently with his purchase of the Park, Petitioner instituted proceedings before the Commission seeking a "hardship rent increase" based upon a 1986 year of application (this hardship rent increase petition, the first mandate proceeding which followed in the Superior Court, and the California Court of Appeal, Fourth Appellate District, Division Two's resolution of the appeal are commonly and collectively referred to as "*El Dorado I*").

At that time, the Palm Springs rent control guidelines permitted the inclusion of purchase money interest expenses in calculating hardship rent increases (Guideline § 101(c)(1)(xii) is commonly referred to as the "debt service cost pass-through guideline"). Subsequent to commencement of *El Dorado I* and on December 15, 1986, the City Council repealed the debt service cost pass-through guideline, thereby eliminating debt service

expense as an allowable expense under the City's Rent Control Ordinance.[2]

On July 18, 1988, the hardship rent increase administrative hearings in *El Dorado I* concluded, and on October 17, 1988, the Commission issued its original findings and decision. Pursuant to that decision, Petitioner was authorized a monthly per space hardship rent increase of $65.17 "until further order of [the] Commission."[3] In doing so, however, the Commission disallowed substantially all of the debt service expenses claimed by Petitioner based upon the prior repeal of the debt service cost pass-through guideline.

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[2] In doing so, the City brought its rent control ordinance in line with those of other California municipalities, almost all of which limit the ability of landlords to pass-through debt service expenses to tenants in hardship rent increase proceedings. There is not a shred of evidence in the record below to support the argument advanced by Petitioner that the City Council repealed the guidelines in response to "political pressure" from the Residents.

[3] While the court below ultimately concluded that the Commission was obligated to fix the duration of this hardship rent increase for either a "stated period of time" or "permanently," the court below expressly rejected, on adequate and independent state or municipal law grounds, the argument *again* advanced by Petitioner that inclusion of the phrase "until further order of [the] Commission" meant the hardship rent increase was permanent. (*See* Appendix No. 1, Slip Op. at 14 ["It does not follow, as (Petitioner) urges, that the hardship rent increase was necessarily permanent . . . and the Commission had jurisdiction to later enter an order granting a hardship rent increase which conformed to one of the two available options within the Commission's powers."].)

C. *Palacio* is Decided.

On March 3, 1989, the California Court of Appeal, Fourth Appellate District, Division Two, issued its opinion in *Palacio de Anza v. Palm Springs Rent Review Commission*, 209 Cal.App.3d 116, 257 Cal.Rptr. 121 (1989), holding that a Palm Springs landlord, who purchased rental property in reliance upon the debt service cost pass-through guideline, had a "vested property right" to continue to include debt service expense (notwithstanding the repeal of the debt service cost pass-through guideline) in proceedings before the Commission for a hardship rent increase. The precise holding of the *Palacio* court was as follows:

> The Guidelines and rent control ordinances did not create a statutory "right of action" in Palacio. *Rather, those enactments created land-use property rights which became vested in Palacio when the financing of the apartment purchase was undertaken in reliance on the existing rent-control laws.* In this sense, Palacio enjoys a situation or status analogous to that of one who has established the right to pursue a nonconforming use on land following a zoning change. (*City of Santa Barbara v. Modern Neon Sign Co.* (1961) 189 Cal.App.2d 188 [11 Cal.Rptr. 57].) *Any attempt to retroactively apply the repeal of the Guidelines' debt financing cost allowance to Palacio's vested rights would constitute an invalid impairment of an established economic/property interest without due process of law.*

209 Cal.App.3d at 120 (emphasis added).

D. The Park is Refinanced.

On March 22, 1989 (indisputably after the repeal of the debt service cost pass-through guideline), Petitioner refinanced his entire purchase money mortgage debt by executing a new note for some $8,650,000 secured by a first priority deed of trust on the Park. The amount financed was in *excess* of the actual purchase price for the Park.

E. The First Superior Court Writ Proceeding.

On May 22, 1989, Petitioner instituted proceedings before the California Superior Court seeking a writ of administrative mandate. Specifically, Petitioner argued that, like the landlord in *Palacio*, he too had a "vested right" to continue to treat purchase money debt service as an allowable expense incident to a petition for a hardship rent increase notwithstanding the repeal of the debt service cost pass-through guideline.

On December 8, 1989, the trial court issued a Peremptory Writ of Mandate directing the Commission to modify its original findings and decision to include debt service expenses previously disallowed in calculating the sought-for hardship rent increase. The trial court further ordered the Commission to award Petitioner an additional monthly hardship rent increase of $114.29 per space for a total authorized hardship rent increase of $179.46 per space per month. The writ of mandate further authorized collection of this additional hardship rent increase commencing from and after March 1, 1990.

F. The Opinion of the Court of Appeal in *El Dorado I*.

On December 11, 1989, the Residents (with amicus support from the City of Palm Springs) appealed the writ of mandate to the California Court of Appeal, Fourth Appellate District, Division Two. Consequently, collection of that additional per space monthly hardship rent of $114.29 was automatically stayed pending appeal. Cal. Civ. Proc. Code §§ 916 & 1110b (no order lifting the automatic stay was issued). During the pendency of the appeal, therefore, no payments (beyond the $65.17 originally ordered by the Commission) were made by the Residents pursuant to the writ of mandate.

The judgement issuing the writ of mandate was affirmed in *El Dorado Palm Springs, Ltd., supra,* 230 Cal.App.3d at 335. More importantly, for purposes of the present Petition, the Court of Appeal, in "Section IV" of its *El Dorado I* opinion, explained and then narrowed the scope of the vested rights doctrine it had previously announced in *Palacio* as follows:

> (1) *Palacio* does *not* stand for the proposition that any landlord holding rental properties within the city which were purchased with a loan predating the repeal of section 101(c)(1)(xii) [the debt service cost pass-through guideline] is entitled to apply for a debt service cost "pass through" rent increase. *Palacio applies only to debt service costs incidental to rental property purchase loans which were initially "assumed" or "undertaken" during that relatively short period of time while section 101(c)(1)(xii) was in effect.* (*Palacio, supra,* 209 Cal.App.3d at p. 120.)

> (2) Consistent with the immediately preceding comment, *Palacio does not apply to any "refinancing" which is carried out following the repeal date of section 101(c)(1)(xii).* Any such refinanced debt burden would have been "assumed" *after* section 101(c)(1)(xii) ceased to be effective.

(*See* Respondent's Appendix No. 1, at App. 26; emphasis added and in original.)

The California Supreme Court subsequently declined to review the decision of the California Court of Appeal, Fourth Appellate District, Division Two. Indeed, Petitioner filed a brief in opposition to the petitions of the Commission and the Residents seeking review before the California Supreme Court. Most importantly, Petitioner *did not seek review* of Section IV (or any other portion for that matter) of the opinion in *El Dorado I.*

On September 5, 1991, the Court of Appeal issued its remittitur, and the California Superior Court reacquired jurisdiction. Hence, the writ of mandate became *final* and enforceable. No petition for discretionary review of *El Dorado I* was ever presented to this Court.[4]

G. Actions of the Commission Following Remand.

On October 8, 1991, the Commission entered amended findings, thereby implementing the mandatory requirements of the writ of mandate. On October 10,

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[4] Under California law, upon issuance of the remittitur, the judgment and opinion in *El Dorado I* became final for all purposes. *Hampton v. Superior Court*, 38 Cal.2d 652, 654, 242 P.2d 1 (1952); Cal. Civ. Proc. Code §§ 43 and 912.

1991, the Commission made its return on the writ of mandate to the trial court.

H. Petitioner Demands 300% Rent Increase.

Significantly, in July, 1991, in apparent anticipation of the writ being affirmed on appeal, Petitioner notified his Residents that, commencing on October 1, 1991, he would begin collection of $2,352.47 per space, representing accrued rents of $2,171.51 authorized by the writ (at $114.29 per month from and after March 1, 1990, through September 30, 1991) inclusive of interest at 10% per annum. Petitioner indicated his willingness to spread these lump sum accrued rents over three months at $797.26 per month.

In addition, Petitioner demanded that payment of the non-accrued monthly hardship rent increase of $114.29 per month also commence on October 1, 1991. Petitioner maintained the court-ordered payment of $114.29, together with the Commission-authorized $65.17 payment, represented a *permanent* (that is, without limitation as to duration) hardship rent increase of $179.46 pursuant to its original petition for a hardship rent increase.

The Residents of the Park are largely elderly retirees living on fixed incomes. As of October, 1991, the average per-space rent ranged from approximately $300 to $400. As of October 1, 1991, Petitioner sought to increase those rents to approximately $1,200 to $1,300 – an increase of roughly 300%! The proposed increase, therefore, posed a substantial economic hardship to these Residents.

I. The Residents Petition The Commission for Relief From This Rent Increase (Commission Case No. 91-10-30-F & D-03).

On September 5, 1991, the Residents initiated a petition with the Rent Review Commission, pursuant to Section 4.08.070(f)(2) of the Palm Springs Municipal Code. Specifically, they sought a ruling of the Commission limiting, based on the holding of the court in *El Dorado I*, the duration of the $179.46 per space monthly hardship rent increase authorized by the writ of mandate.

It was undisputed Petitioner refinanced its *entire* purchase money debt (and more) in March, 1989.[5] It was also undisputed that the debt service cost pass-through guideline at issue was repealed in December, 1986 (over two years *prior* to Petitioner's refinancing). Accordingly, the Residents argued the directive of the *El Dorado I* court compelled the conclusion that Petitioner lost his vested right to a continual debt service cost pass-through as of the date of his refinancing.

The Residents additionally sought a refund of all payments sought or received by Petitioner pursuant to its

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[5] Indeed, Petitioner alleges the *El Dorado I* court was *aware* of this refinancing when it added Section IV to its opinion (Section IV was not in the tentative opinion issued prior to oral argument but was added to the final text when the opinion was formally issued) which limited the duration of the pass-through of debt service expense. Accordingly, Petitioner can hardly argue (as he did before the *El Dorado II* court) that Section IV of the *El Dorado I* opinion was "dicta."

hardship petition subsequent to the date of its refinancing, *i.e.*, March, 1989. They further sought an order relieving them of any obligation to pay the court-ordered $114.29 hardship rent increase (including the sum of $2,171.51 that had accrued since March, 1990).

J. Rulings of the Commission of October 30, 1991.

On October 30, 1991, the Commission issued its findings and decision on the administrative petition of the Residents as follows:

1. Request for Refund & Relief From Accrued Rent Denied.

The Commission denied the request for a refund of any rents paid incident to the original hardship petition. It similarly denied the request to be relieved of any obligation to pay accrued rents covering the period March, 1990, to September, 1991 (these rents had accrued by order of the trial court but had not been paid because of the automatic stay of that order during the pendency of the first appeal).

2. Request for Order Limiting Duration of Hardship Rent Increase Granted.

However, applying the directive of the *El Dorado I* opinion, the Commission concluded Petitioner's refinancing in March, 1989, vitiated his state-law "vested right" to continue to treat purchase money debt service costs as an

expense justifying a hardship rent increase. (*See* Appendix No. 2, Slip Op. at 7, ¶ 5.) Noting that its original and amended findings authorized a prospective hardship rent increase in response to a demonstrated hardship for year of application 1986, the Commission determined Petitioner was entitled to a hardship rent increase for the period commencing in January, 1986, through the date of its refinancing in March, 1989 – or for a period of three (3) years and three (3) months.

3. The Commission Fixes Duration of the Hardship Rent Increase.

The trial court's writ of mandate did not authorize collection of the full amount of the hardship rent increase attributable to debt service cost pass-through until March 1, 1990. Therefore, the Commission concluded that, for a period of three (3) years and three (3) months thereafter, or until June 1, 1993, Petitioner was authorized to collect $179.46 per space per month (less any portion thereof, *e.g.*, $65.17 already paid) from his Residents. (*See* Appendix No. 2, Slip Op. at 7-8, ¶¶ 6-8.)

Thereafter, the Commission ordered Petitioner to "roll back" rents to amounts that comport with the City's Rent Control Ordinance (absent the hardship rent component). The Commission noted Petitioner was (and is) free to bring another hardship petition should its operating expenses (other than debt service) justify a continuing hardship rent increase under the City's ordinance. (*See* Appendix No. 2, Slip Op. at 7-8, ¶ 8.) Thus, in a manner consistent with the trial court's writ of mandate, the

Commission issued a "further order" *prospectively* limiting (consistent with the opinions in *Palacio* and *El Dorado I*) the duration of the hardship rent increase awarded (or ordered) pursuant to Petitioner's original hardship rent increase petition for year of application 1986.[6]

K. Petitioner's Contempt Motion.

Decidedly unhappy with the rulings of the Commission, Petitioner instituted contempt proceedings, pursuant to California Code of Civil Procedure § 1097, seeking to set aside the actions of the Commission pursuant to the contempt powers vested in the trial court to enforce its prior writ of mandate.[7] The trial court, on December 12, 1991, correctly denied the requested contempt citation.

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[6] In addition, the Commission found that payment of the lump-sum accrued rents of $2,171.51 ($179.46 - 65.17 x 19 months [covering the period March 1, 1990 to October 1, 1991 while the automatic stay was in effect]), even if spread over three months, represented a substantial economic *hardship* for the Residents. The Commission thus gave the Real Parties in Interest the *option* to satisfy this lump-sum rent obligation *either* according to the payment plan demanded by Landlord *or* over three years provided the Real Parties in Interest paid 10% interest per annum ($2,171.51 X 10% spread over 36 months = 70.07 per month).

[7] About the only thing the Landlord did not seek in its contempt proceeding was to throw individual Commission members in jail (although it clearly hinted at such during proceedings before the Commission prior to October 30, 1991).

L. The Second Superior Court Writ Proceeding.

Petitioner then proceeded to file *another* mandate proceeding challenging the rulings of the Commission on both jurisdictional and substantive grounds. Concurrently therewith, the Residents filed their own mandate proceeding challenging only limited substantive portions of the Commission's rulings.

By stipulation of the parties, both of these writ proceedings were consolidated for purposes of briefing and hearing. Following a lengthy hearing, the California Superior Court denied both writs. There followed consolidated appeals to the California Court of Appeal, Fourth Appellate District, Division Two, the court below whose opinion is the subject of the present Petition for Writ of Certiorari. (Again, for ease of reference, the decision of the Court of Appeal below, together with the administrative action of the Commission on October 30, 1991, and the proceedings before the California Superior Court thereafter may be conveniently and collectively referred to as *"El Dorado II."*)

M. The Opinion of the Court of Appeal in *El Dorado II*.

While the second opinion below construes and then articulates the jurisdiction of the Commission under the organic rent control ordinance of the Palm Springs Municipal Code, the "heart" of the lower court's opinion addressed itself to the dispositive issue pending for review – whether the Commission had, in its rulings of October 31, 1991, correctly applied the California "vested

rights" doctrine as articulated in *Palacio* and as subsequently narrowed in *El Dorado I*. The court below answered that question resoundingly in the affirmative.

Addressing itself to this dispositive state-law issue the Court of Appeal below held as follows:

> El Dorado next contends that in its October 30, 1991 rulings and decision, the Commission misconstrued this court's opinion in *El Dorado I* affirming the writ of mandate. Specifically, El Dorado argues that the language in this court's earlier opinion concerning the effect of *Palacio* (see *ante* at p. 8) was merely dicta, and that this court did not intend such language to apply to El Dorado's March 1989 refinancing. *El Dorado is mistaken; the Commission's October 30, 1991, rulings and decision are fully consistent with the language and intent of this court's decision, in El Dorado I.*

(*See* Appendix No. 1, Slip Op. at 16; emphasis added and in original.)

Having concluded the Commission had correctly applied the "vested rights" doctrine (as articulated in two decisions of the California Court of Appeal, Fourth Appellate District, Division Two), it followed as simple logic the court below would affirm the decision of the Commission in all respects.

III.

SUMMARY OF THE ARGUMENT

When seen for what it really is, the present Petition for Writ of Certiorari is nothing more than an untimely *post-hoc* challenge to a line of cases articulating, and then limiting the application of, a state-law doctrine on "vested rights" in the context of one city's rent control

ordinance. It is curious that Petitioner once defended before the California Supreme Court *the very doctrine* (indeed the very *opinion*) that now results in his claim of deprivation of his federal constitutional rights.[8]

Had such a deprivation occurred in fact, this Petitioner should have long-ago raised the constitutional claims he attempts to construct in this Petition. In reality, however, Petitioner's real dissatisfaction is with the lower court's application of the California "vested rights" doctrine.

Had the court below truly erred in its articulation and application of that doctrine, Petitioner should have been successful in attracting the attention of the California Supreme Court (the body to whom the present Petition should be properly addressed). Because the California Supreme Court concluded that further review

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[8] The *El Dorado II* court specifically *rejected* the arguments advanced by the Commission that the rule of *Palacio* (even as limited in *El Dorado I*) was wrongly decided, should be revisited, and ultimately rejected. Accordingly, the administrative rulings of the Commission which are under attack in this Petition are nothing more than a court-required action to conform its prior administrative ruling to the state-law "vested rights" doctrine articulated in 1989 and later confirmed and limited in 1991. The Commission has taken no independent action beyond that *compelled* by the opinion of the *El Dorado I* court. Had the Commission not issued its October 31, 1991 rulings, it certainly would have been charged with disobeying the directives of the Court of Appeal by the Residents. Accordingly, if there has been any "taking" of Petitioner's property (which there has not been), such a "taking" was effectuated by the 1991 opinion in *El Dorado I* which Petitioner *never sought to have reviewed*.

of the "vested rights" doctrine announced in *Palacio* and later limited in *El Dorado I* was not warranted, Petitioner now comes before this Honorable Court seeking to accomplish (in a federal forum) what rightfully belongs in the state courts.

IV.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

It should now be abundantly clear that the present Petition for Writ of Certiorari is nothing more than an effort to litigate, in a federal forum, questions involving purely state-law considerations regarding the scope of, and application of, the California doctrine of "vested rights" as applied by the California Court of Appeal, Fourth Appellate District, Division Two. Notwithstanding Petitioner's attempts to dress his dissatisfaction with this California "vested rights" doctrine in the habiliments of some federal constitutional deprivations, the *El Dorado II* opinion below did nothing more remarkable than confirm for Petitioner and his Residents that the Commission, in its administrative rulings of October 30, 1991, correctly understood and applied the mandates contained in the opinions of *Palacio* as later clarified and narrowed in *El Dorado I*.

A. The Decision of the Court Below Rests Entirely on Adequate and Independent State-Law Grounds; Such Opinion Addressed and Resolved Purely State-Law Issues Regarding the Scope of Petitioner's "Vested Rights."

This Court, long ago, held "[w]here the judgment of a state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction". *Allen v. Argumba*, 198 U.S. 149, 154, 155, 25 S.Ct. 622, 49 L.Ed. 990 (1905). More recently, this Court articulated the rationale for such a rule as being grounded in "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, [which] have been the cornerstone of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1040, 103 S.Ct. 3469, 72 L.Ed.2d 1201 (1983).

Most recently, this Court has held that "[w]hen a state-court decision is clearly based on state law that is both adequate and independent . . . " there will be no basis for further review by the United States Supreme Court. *Illinois v. Rodriguez*, 497 U.S. 177, 182, 110 S.Ct. 2793, 111 L.Ed. 148 (1990). In determining whether a lower state court's opinion rests on state law, this Court undertakes to review the opinion to see if, in the context of the totality of the opinion, it is "plain" that the decision is grounded in the law of that state. *Illinois, supra*, 497 U.S. at 182; *Michigan, supra*, 463 U.S. at 1042.

For example, in *California v. Freeman*, 488 U.S. 1311, 109 S.Ct. 854, 102 L.Ed.2d 957 (1989), Justice O'Connor reviewed an opinion of the California Supreme Court to determine whether, in light of the teachings of *Michigan v. Long, supra*, 463 U.S. at 1041, it appeared "clear from the face of the opinion that its analysis constitutes an adequate and independent state ground of decision." *Freeman, supra*, 488 U.S. at 1313. Justice O'Connor concluded the analysis contained in the opinion turned on an interpretation of a particular provision of the California penal code. Justice O'Connor further concluded that the structure of the various subsections of the opinion dealt with state law issues which were not "interwoven with federal law," and that such discussion of federal law as existed in that opinion was clearly an "alternative holding" to the decision of the California Supreme Court. *Freeman, supra*, 488 U.S. at 1313-14.

In determining whether the *El Dorado II* opinion below rested its decision on state law grounds, this Honorable Court has only to review the text of that opinion to determine that it "plainly" rests entirely on state law within the Fourth Appellate District. A fair-minded reading of that opinion leads inescapably to the conclusion that it "plainly" rests *entirely* on an application of the doctrine of "vested rights" as that doctrine has been articulated and applied in the Fourth Appellate District, Division Two. Not a single federal authority is cited by the lower court.

Apparently cognizant of this jurisdictional bar to further appellate review, Petitioner repeatedly casts his arguments in the form of allegations that the Commission "terminated" his preexisting hardship rent increase. To

the contrary, the Commission did nothing more than to comply with the dictates of California case law articulating and then limiting the application of the "vested rights" doctrine in the context of the Palm Springs rent control laws.

Therefore, it was not the Commission who "terminated" Petitioner's hardship rent increase; rather it was the opinions of the Court of Appeal in *Palacio* and later in *El Dorado I*. The only action taken by the Commission on October 30, 1991 was to read and apply that doctrine as it was commanded by the Court of Appeal to do in 1991. The 1994 *El Dorado II* opinion below does nothing more remarkable than confirm that the Commission correctly read and applied the opinions of *Palacio* and *El Dorado I*.

B. The October 30, 1991 Rulings of the Commission Do Not Deprive Petitioner of "Due Process of Law."

In his Petition before this Honorable Court, Petitioner focuses all his arguments on his claimed "deprivations," while blithely assuming that any such arguable deprivation occurred "without due process." However, to demonstrate a constitutionally cognizable deprivation, Petitioner must establish *both* a deprivation and the lack of "due process." Even if the Commission were to concede (for the sake of argument only) any deprivation has occurred, it cannot be doubted Petitioner has been afforded abundant "due process."

By now it should be crystal clear the administrative rulings of the Commission of October 30, 1991 amount to nothing more than a correction of its prior hardship rent increase rulings to bring such rulings in conformity with

the durational time limits imposed by the opinion of the *El Dorado I* court. Respectfully, the Commission cannot be found to have deprived Petitioner of some constitutionally protected right when the action taken by the Commission is compelled by an opinion of a court of appellate jurisdiction contained in an opinion issued directly to that Commission, which order long-ago became final due to Petitioner's failure to seek review of *any portion* of that opinion. *Cf., Baker v. McCollan*, 443 U.S. 137, 145-46, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) (police did not deprive arrestee of due process where arrest was pursuant to valid warrant but identifying the wrong person; *Mitchell v. Aliusi*, 872 F.2d 577, 579 (4th Cir. 1989) (no violation of due process where officer acts in response to command of a facially valid warrant).

Therefore, if there has been any "deprivation," such has been visited upon this Petitioner by the panels of justices who confirmed and limited the application of the vested rights doctrine articulated in *Palacio* and later in *El Dorado I*. Even then, Petitioner is hardly in a position to argue that any "deprivation" he has sustained occurred without "due process."

Petitioner was the plaintiff in the first superior court writ of mandate proceeding that resulted in the opinion in *El Dorado I*. He was the prevailing party in that litigation, and he was awarded a *substantial* additional hardship rent increase. Petitioner was the *responding* party in the subsequent appeal to the Fourth Appellate District, Division Two, which resulted in an opinion confirming the rent increase ordered by the California Superior Court, but which *also* made clear that such rent increase

as had been awarded had a potential durational time limit.

Most importantly, it was Petitioner who *urged* the California Supreme Court *not to accept the petitions of the Commission and the Residents* to review claimed errors in the opinion of *El Dorado I*. What has now become obvious is that Petitioner did not really believe the *El Dorado I* court meant what it said in Section IV of its opinion regarding the potential for a durational limit on the pass-through of debt service expenses. Indeed, Petitioner argued in the proceedings below that Section IV of the lower court's *El Dorado I* opinion was, in reality, "dicta" to the decision and/or that Section IV did not apply to what Petitioner characterized to be his "replacement" financing.

To put it bluntly, Petitioner was simply in error to have ignored Section IV of the *El Dorado I* court's opinion and not to, thereafter, have sought review of that opinion. He now attempts to *blame* the Commission for doing that which it was commanded by the Court of Appeal to do at his behest.

C. The October 30, 1991 Rulings of the Commission Do Not Result in a "Taking" of Petitioner's Property.

Of course, the foregoing analysis assumes (for the sake of argument only) there has been, in part, some form of taking of Petitioner's property by the Commission. Even if this Court were to put aside the indisputable fact that the Commission acted merely to comply with the mandate of the opinions of the lower court in *Palacio* and

El Dorado I, the actions of the Commission in setting a duration on a previously awarded discretionary hardship rent increase does not result in a taking of property under the Fifth Amendment to the United States Constitution.

It is well-settled that regulatory action which results merely in the reduction in value of real property does not affect a "taking." *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 518, 125 Cal.Rptr. 365 (1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495 (1976); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 928, 100 S.Ct. 1315, 63 L.Ed.2d 761, *reh'g denied*, 464 U.S. 929, 100 S.Ct. 1867, 64 L.Ed.2d 282 (1980). Petitioner's claim is simply that, because the Commission terminated the duration of its previously court-ordered hardship rent increase, notwithstanding that such termination was in compliance with the mandate of the opinion in *El Dorado I*, the Commission has taken his property. Not so. Nothing in the United States Constitution guarantees Petitioner the right to indefinite hardship rents or maximum profits.

As this Court stated in *Andrus v. Allred*, 444 U.S. 51, 65, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979):

> Suffice it to say that government regulations – by definition – involve the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel a government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law." [Citation omitted.]

> The Takings Clause, therefore, preserves governmental power to regulate, subject only to dictates of "justice and fairness." [Citations omitted.] . . . But the denial of one traditional property right does not always amount to a taking. At least where an owner poses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. . . .
>
> It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. [Citations omitted.] . . . At any rate, loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim.

A land use regulation affects a taking " 'only when its effect is to deprive the landowner of substantially all reasonable use of his property.' " *Delucchi v. County of Santa Cruz*, 179 Cal.App.3d 814, 825, 225 Cal.Rptr. 43 (1986); *Griffin Development Co. v. City of Oxnard*, 39 Cal.3d 256, 266, 217 Cal.Rptr. 1 (1985).

Accordingly, not only has Petitioner been afforded all the process he is due (and more), the 1991 administrative rulings of the Commission do not affect a taking of his property in any event.[9]

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[9] In his "takings" argument, Petitioner relies on the now "repudiated model" for takings as articulated by Justice Holmes in *Pennsylvania Coal Company v. Mahone*, 260 U.S. 393, 43 S.Ct.

D. This Petition, and the Purported Constitutional Issues Raised Therein, is Untimely.

Once the actions of the Commission are placed in appropriate context, it becomes immediately clear that this Petition for Writ of Certiorari is nothing more than an untimely challenge to the 1991 opinion of the Court of Appeal, Fourth Appellate District, Division Two, arising out of its decision in *El Dorado I*. Further, pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States, the constitutional issues purportedly raised in the pending Petition are untimely because they should have been raised initially before the California Supreme Court following issuance of the *El Dorado I* decision and, if unsuccessful in that forum, before this Honorable Court *thereafter*.

It is simply too late for Petitioner to suddenly realize the opinion of the *El Dorado I* court would result in some "deprivation" of his claimed constitutional rights but to await the raising of those issues until that same court later confirmed, in its 1994 *El Dorado II* opinion, that it

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158, 67 L.Ed. 322 (1922). Commenting on the history of this Court's takings jurisprudence, Professor Manheim observes "the court has squarely rejected Justice Holmes' model of dividing single parcels into discrete estates, favoring instead Justice Brandeis' approach of looking at a law's impact on overall property value. . . . [¶] Under the modern unitary approach, the net economic impact of the state law, even when combined with local rent control, would be insufficient to cause a regulatory taking." Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis.L.Rev. 925, 969 & n. 237 (1989).

meant what it said back in 1991. To put it bluntly, this Petition is too little, too late.

V.

CONCLUSION

The Commission finds itself in a "damned if it does, damned if it doesn't" circumstance in the present Petition. Had it failed to issue its administrative rulings of October 31, 1991, setting a durational limit on the previously court-ordered hardship rent, the Commission risked the sanction that would have followed for failing to comply with the dictates of the Court of Appeal in its *El Dorado I* opinion. Having dutifully complied with the dictates of that same court, and having been assured by the *El Dorado II* court that it acted correctly, the Commission now finds itself accused before this Honorable Court of having wrecked constitutional havoc on Petitioner.

Respectfully, the actions of the Commission do not present *any* question of federal law, much less an important one, that has not been, but should be, settled by the United States Supreme Court.

DATE: November 16, 1994

Respectfully submitted,

RUTAN & TUCKER

WILLIAM W. WYNDER
Attorneys for Respondent,
Rent Review Commission of The City Of Palm Springs

RESPONDENT'S APPENDIX NO. 1

APPENDIX I

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

EL DORADO PALM SPRINGS, LTD., etc., Plaintiff and Respondent, v. RENT REVIEW COMMISSION OF THE CITY OF PALM SPRINGS, Defendant.	E007483 (Super. Ct.No. I 57251) OPINION (Filed May 20, 1991)
RESIDENTS OF THE EL DORADO MOBILE HOME PARK, Real Parties in Interest and Appellants.	

APPEAL from an order of the Superior Court of Riverside County granting a petition for a writ of mandate. Richard V. Lee, Temporary Judge. (Pursuant to Cal. Const., art. VI, §21.) Affirmed.

Charles A. Prawdzik, for Real Parties in Interest and Appellants.

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*This opinion is certified for publication pursuant to rules 976(b) and 976.1 of the California Rules of Court except as to Sections I.B., II, III, IV and V of this opinion.

Shapiro, Posell & Close, Richard E. Posell, Jonathan J. Panzer and Lisa L. Skaist, and Best, Best & Krieger, Paul T. Colzer and Basil T. Chapman, for Plaintiff and Respondent.

No appearance for Defendant.

William J. Adams, City Attorney (Palm Springs) and Siegfried H. Siefkes, Assistant City Attorney, and Freilich, Stone, Leitner & Carlisle and Benjamin Kaufman as Amici Curiae on behalf of Appellants.[1]

This case involves a dispute between the owner/operator of a Palm Springs mobile home park (the petitioner below and the respondent herein – referred to hereinafter as El Dorado) and the residents of that mobile home park (the real parties in interest below and the appellants herein – referred to hereinafter as the residents). The gist of the dispute concerns the application of the Palm Springs municipal rent-control laws by the Palm Springs Rent Review Commission (the respondent below – referred to hereinafter as the Commission) to the space rents to be charged in that mobile home park.

The residents' appeal from an order of the trial court, which order granted El Dorado's petition for a writ of mandate to compel the Commission to approve El Dorado's application for a hardship rent increase. By their appeal, the residents have called upon us to rework the

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[1] In point of fact, the amici curiae in this case represent the position taken by the defendant Commission. By order of this court dated August 3, 1990, the Commission's Respondent's Brief was deemed to be an amicus curiae brief pursuant to rule 14(b) of the California Rules of Court.

fertile fields of contention which we first plowed in *Palacio de Anza* v. *Palm Springs Rent Review Com.* (1989) 209 Cal.App.3d 116 (hereinafter *Palacio*). We conclude that the trial court's order is correct in all respects, and we consequently affirm the same.

FACTS[2]

On April 8, 1980, the citizens of the city of Palm Springs adopted an initiative rent-control ordinance. In general terms, this initiative ordinance: (1) Prohibited rent increases from being imposed more frequently than once a year; (2) limited rent increases to rates of no more than three-fourths of the percentage increase in the Consumer Price Index over any one-year period of time in question; (3) did not contain a "hardship rent increase" provision for landlords, other than a provision which declared the ordinance to be non-applicable to those rental properties as to which the ordinance would operate in a "confiscatory" manner; and (4) required that a determination as to whether such a confiscatory impact had occurred in any one particular case be made by the courts. The initiative ordinance also permitted the City Council of Palm Springs to "supplement" the initiative ordinance "so long as Palm Springs in no way diminishes any protection which this ordinance affords to tenants." (Init. Ord., § 10.)

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[2] In large part, our description of the municipal background underlying this dispute is taken from our opinion in *Palacio*.

On October 1, 1980, the Palm Springs City Council adopted Ordinance No. 1117. This ordinance apparently was adopted to forestall a constitutional challenge to the initiative rent-control ordinance.[3] Ordinance No. 1117 supplemented the initiative ordinance by creating a Rent Review Commission and providing for hardship increases in rents over and above those allowed by the initiative ordinance in certain limited circumstances.

On November 18, 1983, the Commission conveyed a written recommendation to the city council that the city council adopt certain "Guidelines For Hardship Rent Increases" (hereinafter referred to as the Guidelines). The Guidelines set forth a very specific format and procedure for evaluating landlord applications for hardship rent increases. Among the provisions contained in the recommended Guidelines was a provision (section 101(c)(1)(xii)) which permitted the inclusion of certain purchase-money financing interest payments (debt service costs) in the costs which were allowable for the purpose of calculating a landlord's "net operating income."[4] In accordance with the

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[3] Ordinance No. 1117 was apparently intended to overcome any possible constitutional shortcoming in the initiative ordinance resulting from the lack of an "adjustment mechanism" in the initiative ordinance for modifying maximum rental rates in particular cases. (See *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, 169-174.)

[4] These "allowable costs" are often times referred to (both in this opinion and in general) as "allowable operating expenses."

The Palm Springs rent-control law seeks to assure that each landlord receives a "fair" financial return from the landlord's rental property. This return is expressed in terms of a landlord's "net operating income." "Net operating income," in turn, is

Commission's recommendation, the city council adopted the Guidelines by resolution on December 7, 1983.

On January 18, 1984, the city council adopted Ordinance No. 1213. This ordinance was intended to simply restate and codify (as part of the municipal code) the provisions of the prior rent-control ordinances, beginning with the initiative ordinance, and not to supersede or repeal any of those preexisting provisions.

In the spring of 1986, El Dorado was in the process of finalizing its negotiations for the purchase of the mobile home park here in question. Section 101(c)(1)(xii) of the Guidelines, the provision that allowed purchase-money debt service costs to be included as an allowable operating expense in calculating a landlord's net operating income, was of particular concern to El Dorado. El Dorado insisted on a clause in the purchase agreement that

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defined (in a general way) as a landlord's gross income minus allowable operating expenses. The greater the number, amount and types of operating expenses "allowed" for the purpose of calculating a landlord's net operating income, then, the smaller the net operating income itself will be (for any one given level of gross income) – thus making it more likely that a landlord would be permitted to impose a hardship rent increase.

On another, related issue: The Guidelines (as originally adopted) did not permit the characterization of *all* purchase-money debt service costs as an allowable operating expense. Rather, it was only the portion of those costs which exceeded the level of such costs on September 1, 1979 which were "allowable" as an operating expense in calculating a landlord's net operating income. Whenever we refer in this opinion to El Dorado's purchase-money debt service costs, we are referring only to this "excess" cost borne by El Dorado.

would permit it (El Dorado) to withdraw from the purchase of the mobile home park if the Guidelines (and, in particular, section 101(c)(1)(xii)) changed materially prior to the close of the purchase escrow.[5] No such changes in the Guidelines occurred prior to the close of the purchase escrow, and, on April 1, 1986, El Dorado purchased the mobile home park for the sum of $7.5 million – some $7,360,000 of which was financed by promissory notes secured by deeds of trust. On that same day, April 1, 1986, El Dorado filed an application with the Commission for a hardship rent increase. On a "per space" basis, El Dorado's application sought the Commission's approval of a $179.46 monthly rental increase. El Dorado justified its request for a rent increase, to a significant extent, by reference to its purchase-money debt service cost. The residents opposed the application before the Commission.

On April 16, 1986, the Commission opened its hearing on El Dorado's application for a hardship rent

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[5] At oral argument, the Commission contended that El Dorado's interest in section 101(c)(1)(xii) might better be characterized by reference to the words used by the Commission in its final Findings and Decision relating to El Dorado's petition: "Petitioner was aware of the provisions of this guideline before the park was purchased. The provisions of this guideline were a factor in petitioner's decision to purchase the subject property." The language we have used to describe El Dorado's interest in section 101(c)(1)(xii) is not inconsistent with the above language used by the Commission in its Findings and Decision. Further, the language we have used to describe El Dorado's interest in section 101(c)(1)(xii) better reflects the actual, and uncontradicted, testimony given by El Dorado during the Commission's hearing on the matter.

increase. This hearing was conducted periodically over the next two years and three months.

On November 7, 1986, while El Dorado's application for a hardship rent increase was still pending, the Commission recommended to the Palm Springs City Council that it (the city council) repeal section 101(c)(1)(xii) of the Guidelines. On December 15, 1986, the city council acted on this recommendation and adopted Resolution No. 16072, repealing and deleting section 101(c)(1)(xii) from the Guidelines.

On July 18, 1988, the Commission completed its hearing on El Dorado's 1986 application for a hardship rent increase and indicated its intended decision on the matter. On October 17, 1988, the Commission issued its final written Findings and Decision with respect to that application. Of particular interest here, the Commission declined to allow El Dorado's purchase-money debt service cost as an operating expense in calculating El Dorado's net operating income, concluding that the city council's repeal of section 101(c)(1)(xii) of the Guidelines had had the effect of eliminating those costs as an allowable operating expense insofar as El Dorado's application for a rent increase was concerned.[6] The net result of the

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[6] Somewhat more accurately, the Commission *did* allow a partial increase in the amount of debt service cost to be "passed through" as an operating expense, but the partial increase was *not* allowed as a "hardship increase." Rather, the Commission calculated a "standard" debt service cost increase – three-fourths of the percentage increase in the Consumer Price Index from 1979 (the "base year" for the purpose of calculating cost increase allowances) to 1986 (the year of El Dorado's application for a "hardship" rent increase) – applied that reduced

Commission's decision was an approval of a $65.17 "per space" monthly rental increase for El Dorado – some $114.29 per space/per month less than the increase for which El Dorado had applied.

In the meantime, on July 26, 1988 (shortly after the Commission had completed its hearing on El Dorado's rent increase application but before the Commission's final written decision on that application was released), El Dorado notified its residents that the monthly space rentals within the mobile home park would be increased, effective September 1, 1988, by $65.17 per space. El Dorado has, in fact, collected the $65.17 per space monthly rental increase since September 1, 1988.

On March 3, 1989, this court filed its opinion in *Palacio*. In that opinion, we addressed and resolved many of the same regulatory issues which had been points of contention during the Commission's hearing on El Dorado's application for a hardship rent increase. In particular, we had occasion in *Palacio* to address the interplay

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percentage to the amount of annual debt service cost borne by El Dorado's predecessor-in-title in 1979, and allowed the resulting figure ($107,368.00) as an increase in El Dorado's allowable operating expenses. Noteworthy here, the amount of increased debt service cost allowed to El Dorado by the Commission as an operating expense: (1) Was allowed pursuant to the "standard" rental increase provisions of the applicable local regulations, not pursuant to the extraordinary "hardship" rental increase provisions of those regulations; and (2) was less than one-fifth of the $578,142.00 borne by El Dorado in 1986 as increased debt service cost.

On a related matter, the Commission also declined to treat certain capital expenditures made by El Dorado as an allowable cost in calculating El Dorado's net operating income.

between (1) section 101(c)(1)(xii) of the Guidelines, (2) the repeal of that section by the Palm Springs City Council and (3) purchase-money debt service obligations which pre-dated the repeal of that section. In *Palacio,* we held:

"The Guidelines and rent-control ordinances did not create a statutory 'right of action' in Palacio. Rather, those enactments created land-use property rights which became vested in Palacio when the financing of the apartment purchase was undertaken in reliance on the existing rent-control laws. In this sense, Palacio enjoys a situation analogous to that of one who has established the right to pursue a nonconforming use on land following a zoning change. (*City of Santa Barbara* v. *Modern Neon Sign Co.* (1961) 189 Cal.App.2d 188.) Any attempt to retroactively apply the repeal of the Guidelines' debt financing cost allowance to Palacio's vested rights would constitute an invalid impairment of an established economic/property interest without due process of law. [¶] Notwithstanding the adoption of resolution No. 16072 [the repeal of section 101(c)(1)(xii) of the Guidelines], Palacio continues to enjoy the benefit of the Guidelines' debt financing cost allowance provisions which were in effect when Palacio assumed its purchase debt obligation." (*Palacio,* at pp. 120-121.)

On May 22, 1989, encouraged by our opinion in *Palacio,* El Dorado filed a petition for a writ of mandate in the court below. In general terms, El Dorado's petition sought the issuance of a writ of mandate to compel the Commission to grant that portion of El Dorado's application for a hardship rent increase which had not previously been granted by the Commission. As noted above, far and away the most significant issue remaining in

dispute between El Dorado and the Commission was the allowance of El Dorado's purchase-money debt service costs as an operating expense for the purpose of calculating El Dorado's net operating income.

The residents filed a demurrer to El Dorado's petition for a writ of mandate. The residents' demurrer was largely based on their argument that the 90-day statute of limitations set forth in section 1094.6 of the Code of Civil Procedure controlled El Dorado's challenge to the Commission's decision, that this statute of limitations had expired prior to El Dorado's having filed its petition for a writ of mandate, and that, consequently, the trial court was without jurisdiction to consider the matter.[7]

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[7] Section 1094.6 of the Code of Civil Procedure, and its various subdivisions, will hereinafter be referred to by section number, and/or by subdivision letter designation, only.

In pertinent part, section 1094.6 provides:

"(a) Judicial review of any decision of a local agency, . . . may be had pursuant to Section 1094.5 of this code only if the petition for writ of mandate pursuant to such section is filed within the time limits specified in this section.

"(b) Any such petition shall be filed not later than the 90th day following the date on which the decision becomes final. If there is no provision for reconsideration of the decision in any applicable provision of any statute, charter, or rule, for the purposes of this section, the decision is final on the date it is made. . . .

". . . .

"(e) As used in this section, decision means a decision subject to review pursuant to Section 1094.5, . . . denying an application for a permit, license or other entitlement, . . .

"(f) In making a final decision as defined in subdivision (e), the local agency shall provide notice to the party that the time within which judicial review must be sought is governed by this section. . . .

Following a hearing on the matter, the trial court concluded that the Commission had failed to comply with the notice requirements of section 1094.6, subdivision (f), and that the 90-day statute of limitations provided by section 1094.6 had consequently been tolled prior to El Dorado's having filed its petition for a writ of mandate. Having reached the above conclusion, the trial court overruled the residents' demurrer.[8]

Following further briefing and a hearing on the merits of El Dorado's petition for a writ of mandate, the trial court granted El Dorado's petition on December 4, 1989. On December 8, 1989, the trial court issued a detailed writ of mandate. In primary effect, the writ compelled the Commission to apply the provisions of (the now repealed) section 101(c)(1)(xii) of the Guidelines to

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"(g) This section shall be applicable to a local agency only if the governing board thereof adopts an ordinance or resolution making this section applicable. If such ordinance or resolution is adopted, the provisions of this section shall prevail over any conflicting provision in any otherwise applicable law relating to the subject matter, unless the conflicting provision is a state or federal law which provides a shorter statute of limitations, in which case the shorter statute of limitations shall apply."

With regard to subdivision (g), above, the Palm Springs City Council adopted an ordinance (Ordinance No. 1162) on September 15, 1982, making section 1094.6 applicable to the judicial review of local administrative decisions.

[8] The trial court also found that the residents, through their prior attorney of record, had waived any statute of limitations argument under section 1094.6. Inasmuch as we agree with the trial court's determination that the 90-day statute of limitations provided by section 1094.6 was tolled in this case, we need not address the correctness of the trial court's waiver determination.

El Dorado's application for a hardship rent increase so as to allow El Dorado's purchase-money debt service costs as operating expenses in calculating El Dorado's net operating income. The writ also compelled the Commission to allow, as operating expenses, certain other lesser costs borne by El Dorado (costs previously denied by the Commission as allowable operating expenses) in calculating El Dorado's net operating income.

The residents have appealed from the trial court's grant of El Dorado's petition for a writ of mandate. On appeal, the residents have raised the following contentions:[9] (1) The trial court acted in excess of its jurisdiction in granting El Dorado's petition for a writ of mandate in that the 90-day statute of limitations applicable to El Dorado's petition (the statute of limitations set forth in section 1094.6) had long since expired by the time El Dorado filed its petition; (2) the decision which was issued by the Commission with respect to El Dorado's application for a hardship rent increase was res judicata (after 90 days had run from the date of the decision) as to any subsequent proceeding concerning the same subject matter; (3) El Dorado, having accepted the benefit of the rent increase allowance which was granted by the Commission, was estopped from seeking a writ of mandate in an effort to obtain an even greater rent increase; (4) the trial court's decision to issue the writ of mandate was

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[9] This listing of contentions has been somewhat reordered and recharacterized by us in the interest of (1) sequencing the contentions in a more logical order and (2) clarifying the underlying legal issues raised by the residents on appeal.

improper in that it was based on an invalid, unenforceable provision of the Guidelines (section 101(c)(1)(xii) of the Guidelines); (5) *Palacio* is wrongfully decided, and El Dorado cannot be deemed to have acquired a vested right to indirectly "pass through" purchase-money debt service costs to the mobile home park residents as an allowable operating expense; and (6) the writ of mandate issued by the trial court violates the separation of powers doctrine by excessively intruding on the Commission's own discretionary authority (see Code of Civ. Proc., § 1094.5, subd. (f)).[10]

We conclude that the residents' contentions are without merit and affirm the trial court's order (and writ) in full. Additional facts will be referred to, as needed, in the discussion which follows.

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[10] The degree of judicial deference to administrative discretion which is required of courts in this area of the law by the separation of powers doctrine is statutorily expressed in subdivision (f) of section 1094.5 of the Code of Civil Procedure: "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

DISCUSSION

I.

THE TIMELINESS OF EL DORADO'S PETITION FOR A WRIT OF MANDATE

A. The Application Of Section 1094.6.

The parties are in agreement that section 1094.6 governs the timeliness of El Dorado's petition for a writ of mandate. The parties are also in agreement that: (1) El Dorado's petition was filed more than 90 days after the Commission's final written decision was issued; and (2) the Commission never gave El Dorado direct notice that section 1094.6 would govern the timeliness of an attempt to secure judicial review of the Commission's decision.[11] Not surprisingly, however, the parties are in disagreement as to whether El Dorado's petition for a writ of mandate was timely under this set of circumstances.

The effect of a failure by a local agency to provide the notice required by section 1094.6, subdivision (f), on the running of the 90-day statute of limitations set forth in subdivision (b) of that section was recently addressed in *Cummings* v. *City of Vernon* (1989) 214 Cal.App.3d 919:

"In light of the background of this statute we conclude the Legislature intended the [90-day] period to run

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[11] It is, perhaps, somewhat overstating the matter to say that there is an "agreement" to the effect that the Commission failed to directly provide El Dorado with the notice required by section 1094.6, subdivision (f). However, neither the residents nor the Commission argue that such notice *was* directly given – and the record is devoid of any indication that such a notice was given.

from the date of giving notice. The legislative background and the purpose of section 1094.6 were discussed in *Hittle* v. *Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 386-387. Prior to enactment of section 1094.6, petitions for administrative mandamus to review local agency decisions were subject to the general statutes of limitations, which were three years for statutory liability and four years for other cases unless otherwise specified. (*Id.* at p. 386.) Courts criticized these periods as unduly long, and section 1094.6 was the legislative response to this problem. It gave local agencies the *option* of adopting, by ordinance or resolution, a 90-day limitation period for seeking judicial review of their administrative decisions. (*Id.* at pp. 386-387.)

"This background makes clear the importance of the notice requirement in subdivision (f). Without the enactment of section 1094.6 and adoption of section 1094.6 by local ordinance or resolution, the applicable statute of limitations would be three or four years. The Legislature considered it vitally important that parties be notified a 90-day period is applicable instead.

"Since the application of section 1094.6 drastically reduces the statute of limitations, we should avoid an interpretation which shortens the period even further. In *Hittle* v. *Santa Barbara County Employees Retirement Assn., supra,* 39 Cal.3d at page 387, the court held that section 1094.6 impliedly prohibits the local agency from adopting a limitation period *shorter* than 90 days. If the period in section 1094.6 were to run from the date of the decision regardless of the date of notice, any substantial delay in giving the notice would, as a practical matter, substantially reduce the actual time available for preparing a

petition. Since section 1094.6 benefits local agencies by reducing the statute of limitations, requires local agencies to give the notice, and impliedly prohibits local agencies from adopting a shorter limitation period, it should not be interpreted in a way which permits local agencies to shorten the period even further by delaying the notice. This is avoided if the local agency's decision does not become final for the purpose of subdivision (b) until the notice required by subdivision (f) is given." (*Cummings* v. *City of Vernon, supra,* 214 Cal.App.3d at pp. 922-923.)

Cummings reached its conclusion that a local agency decision should not be deemed to be final for the purpose of subdivision (b) until the notice was given pursuant to subdivision (f), at least in part, because of the peculiar language used by the Legislature in subdivision (f): "*In making a final decision* . . . the local agency shall provide notice. . . . " (Emphasis added.) *Cummings* saw this language as "reasonably impl[ying] that providing the notice is an essential condition for the decision to become final." (*Id.* at p. 922.)

While we agree with *Cummings* that the 90-day statute of limitations of section 1094.6 does not begin to run until the subdivision (f) notice is given, we do not agree that that notice must be given in order that the local agency's decision be deemed final for the purpose of subdivision (b). There are two reasons for our disagreement. First, it seems to us that one must give section 1094.6 a strained reading to conclude that that section uses the phrase "final decision" to mean anything other than, or more than, the substantive decision reached, and then issued in final form, by a local agency following the

completion of that agency's administrative decision-making processes. Second, taken to its (il)logical conclusion, *Cummings'* position on "finality" would permit a local agency to preclude a decision's *ever* becoming final by the simple expedient of never issuing a notice pursuant to subdivision (f). In light of the fact that only "final" administrative decisions are subject to judicial review (see Code of Civ. Proc., § 1094.5, subd. (a)), *Cummings'* position on "finality" results in a state of affairs wherein the mere failure of a local agency to give notice pursuant to subdivision (f) effectively insulates an agency decision from judicial review. This, clearly, is not a result intended by our Legislature.

it seems to us that the better course in interpreting section 1094.6 is to avoid any attempt to give "finality" a strained reading and, instead, to simply read the section as containing a 90-day statute of limitations that is *tolled* until such time as the subdivision (f) notice is given. This interpretation of the section best achieves the overall harmonization of the section's various subdivisions. (*Pitney-Bowes, Inc.* v. *State of California* (1980) 108 Cal.App.3d 307, 313.) We make the following two observations concerning our interpretation of section 1094.6:

(1) Under this interpretation, an aggrieved party need not wait until receiving notice pursuant to subdivision (f) to seek judicial review of a local agency's administrative decision -- that decision is "final" under

subdivision (b) as soon as the local agency has issued its decision in final form;[12] and

(2) A failure by a local agency to give a subdivision (f) notice would not give an aggrieved party an "open-ended" period of time within which to seek judicial review of the administrative decision in question.[13] Notwithstanding the tolling of the 90-day statute of limitations in such a case, the doctrine of laches would still apply to the timeliness of a party's effort to secure judicial review. It is clear that mandamus is a type of action in which equitable principles, such as the doctrine of laches, apply. (*Hittle* v. *Santa Barbara County Employees Assn.* (1985) 39 Cal.3d 374, 386, citing *Conti* v. *Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 357, fn.3.) It is equally clear that laches may apply independently in a mandate proceeding, notwithstanding the existence of an applicable statute of limitations. (*People* v. *Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 195.)[14]

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[12] In those instances where an agency provides for an administrative reconsideration of its decisions, a decision would not be "final" until the opportunities for administrative reconsideration had been exhausted or, in appropriate cases, otherwise allowed to expire.

[13] El Dorado has suggested that the prior three and four year statutes of limitation (see discussion in *Cummings, ante*) would apply if the local agency failed to ever give a subdivision (f) notice. This suggestion lacks merit, however, because it simply ignores subdivision (g) – the provision which gives section 1094.6, if adopted, overriding authority with respect to the timeliness of a petition for judicial review.

[14] The residents have not argued laches at any point in this case, and we do not address the direct applicability of that equitable doctrine to the facts of this case.

The residents have argued that the notice requirement of subdivision (f) was met for all practical purposes just as soon as the Commission issued its final decision. The residents base their argument on their contention that counsel for El Dorado is so knowledgeable in the area of municipal law that they must have known of the 90-day statute of limitation. This argument is utterly specious. The residents' argument completely ignores the clear statutory mandate set forth in subdivision (f) that "the local agency shall provide notice to the party."[15]

The Commission argues, in its amicus brief, that the city's adoption of section 1094.6 by ordinance constitutes constructive notice to all parties of the applicability of that section to local administrative decisions. Again, this argument simply overlooks, or ignores, the plain mandate of subdivision (f). The use of the phrase "In making a final decision" in subdivision (f) compels the conclusion that the Legislature intended that a local agency be responsible for the additional task of giving direct notice to a party pursuant to subdivision (f) in *each* instance where a final decision is rendered. With respect to the

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[15] The residents have also argued that only four conditions need be met in order that section 1094.6 be applicable and operational in any one given situation – and that all four conditions are met in this case. In support of this argument, the residents cite *Foster* v. *Civil Service Com.* (1983) 142 Cal.App.3d 444, 450-451. It is true that *Foster* sets forth four conditions necessary to section 1094.6's becoming applicable and operational in any one given situation – but *Foster* notes that section 1094.6 becomes applicable and operational in the presence of the four conditions *"unless otherwise tolled."* (*Id.*, at p. 450, emphasis added.) The residents failed to allude to this critical qualification in their citation to *Foster.*

giving of such notice, we note: (1) A "direct" notice is one which is communicated forthwith and in a straightforward manner to a party or that party's recognized agent (e.g., a party's attorney during the proceedings in question) as soon as the administrative decision has become final; (2) a subdivision (f) notice is effective when *given* in the manner outlined in note (1), above, not when it is actually *received*; and (3) there is no statutory requirement that the notice be given in writing – although a local agency might well wish to do so in the interest of establishing a record that the notice was, in fact, given.

El Dorado's petition was not barred by the 90-day statute of limitations set forth in section 1094.6.

B. Res Judicata.

The residents have argued that the Commission decision was final and res judicata as to the issues therein addressed 90 days after that decision was issued and that, consequently, the trial court was precluded from issuing the writ here in question. The residents have based this argument on (a) the 90-day statute of limitation set forth in section 1094.6 and (b) *California Coastal Com.* v. *Superior Court* (1989) 210 Cal.App.3d 1488. There are two reasons why the residents' argument is not well founded and need not detain us long.

First, as noted in the previous section of this opinion, the 90-day statute of limitation set forth in section 1094.6 was tolled in this case as a result of the Commission's failure to provide the appropriate notice required by subdivision (f) of that section.

Second, the reasoning of *California Coastal Com.* (insofar as the issue of res judicata is concerned) has no application to the case at hand. *California Coastal Com.* is a case that concerns a party's failure to seek judicial review of an administrative decision, by way of mandamus, within the applicable time limitations set forth in section 30801 of the Public Resources Code – it has nothing to do with the statutory scheme at play in this case. In *California Coastal Com.*, the aggrieved party, after the running of the statutory 60-day statute of limitation applicable to challenges to the agency decision there in question, filed an inverse condemnation action against the Coastal Commission seeking just compensation for the dedication of a public access easement which had been required of him by the Coastal Commission in an earlier administrative proceeding. The Court of Appeal affirmed the trial court's sustaining of a demurrer to the action because the Coastal Commission's decision, after the running of the 60-day statute of limitation, was final and res judicata as to the legality of the public access easement dedication requirement.

Here, unlike the situation present in *California Coastal Com.*, there is no collateral action challenging the Commission's administrative decision. In this case, we are presented with a direct challenge by way of mandamus. As was noted in Witkin's *California Procedure*: "By its very nature, the doctrine [of res judicata] does not prevent timely direct attack, e.g., by motion for new trial or appeal [or by petition for judicial review by way of an administrative mandamus proceeding]. It only applies where the judgment is final and safe from direct attack, and is *collaterally attacked* in a subsequent proceeding.

[Citations.]" (7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 194, pp. 629-630.) *California Coastal Com.* is totally inapposite to the case at hand and the doctrine of res judicata does not act to bar El Dorado's mandamus action.

II.

ESTOPPEL

The residents have argued that El Dorado acquiesced in the Commission's approval of a $65.17 per space/per month hardship rent increase by charging and collecting that amount from each of the residential units in the mobile home park for eight months prior to filing its petition for a writ of mandate, and that this acquiescence, this acceptance of the benefit of the Commission's decision, should have served to estop El Dorado from challenging the adequacy of that decision. In support of their argument, the residents have relied primarily on *Chang* v. *City of Palos Verdes Estates* (1979) 98 Cal.App.3d 557, a case which, in turn, relies primarily (with respect to the issue here in question) on *Hellman Commercial T. & S. Bk.* v. *Alden* (1929) 206 Cal.592.[16] This argument, too, need not detain us long.

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[16] The residents have also purported to rely on a 1986 District Court of Appeal case entitled *Fontana Unified School Dist.* v. *Burman*. Review was granted in this case by our Supreme Court. (See subsequent opinion at 45 Cal.3d 208.) Counsel for the residents does not serve his clients well by citing to legal authority which was vacated several years ago.

Chang and *Hellman* both stand for the rather unremarkable proposition that a party cannot appeal from (or, impliedly, otherwise seek review of) *that portion* of a judgment or decision in which the party has acquiesced and from which the party has accepted the benefit. That proposition has no application in this case. El Dorado sought judicial review of that portion of the Commission's decision which *denied* $114.29 in per space/per month hardship rent increases – not the portion of that decision which *allowed* $65.17 in per space/per month hardship rent increases. The legal issue which underlies this argument by the residents has already been resolved by our Supreme Court, and, insofar as this case is concerned, in El Dorado's favor: "[A] reversal of the judgment or order cannot affect the right of the party to the benefit which he has secured thereby, as when the only controversy relates to a greater sum. That is to say, where there is no controversy as to a party's right to the amount for which the judgment is given, his acceptance thereof will not preclude an appeal based upon a claim that he was entitled to a greater amount." (*Estate of Hubbell* (1932) 216 Cal. 574, 577.)

El Dorado was not estopped to challenge the Commission's decision by virtue of its (El Dorado's) having "accepted" the Commission's allowance of a $65.17 per space/per month hardship rent increase.

III.

VALIDITY OF SECTION 101(c)(1)(xii)

The next argument asserted against the trial court's issuance of the writ of mandate concerns the very validity

of the debt service "pass through" provision, section 101(c)(1)(xii) of the Guidelines, itself. In essence, the residents argue that section 101(c)(1)(xii) violated, from its inception, the original rent control initiative ordinance, that this violation rendered the "pass through" provision invalid from the outset, and that the trial court was consequently without authority to compel the Commission to utilize that provision in processing El Dorado's application for a hardship rent increase. The residents base their argument on the wording of the initiative ordinance that prohibits the city from adopting any changes to the rent control laws which would "diminish[] any protection which this ordinance affords to tenants." The residents have misconstrued the scope and application of that language.

As noted previously in this opinion (see fn. 3, *ante*), the legislation which created the Commission and provided for hardship rent increases was adopted so as to conform the city's rent control laws to the constitutional dictates of due process. The Guidelines were (and are) nothing more than operational rules designed to assist in the implementation of this local legislation. As such, the Guidelines must be viewed and evaluated in the same context as the local legislation which they are designed to implement. With this in mind, it becomes clear that section 101(c)(1)(xii) of the Guidelines did not violate the above-referenced prohibition of the initiative ordinance. Tenant protection under the initiative ordinance cannot be understood to extend to *unconstitutional* protection against any and all rent increases. To the extent that the Guidelines merely serve to validate the city's rent control

laws (in a constitutional sense) by implementing legislative provisions designed to assure the due process of law for landlords, they (the Guidelines) do not diminish any protection which tenants in the city were entitled to under the initiative ordinance.

Given the fact that the hardship rent increase guidelines, in general, are valid notwithstanding the (arguably) overbroad language of the initiative ordinance, we decline to sit in judgment on the legislative wisdom reflected in the adoption (or repeal) of any one particular scheme for evaluating and weighing hardship rent increase application.[17] Section 101(c)(1)(xii) of the Guidelines was not, as a matter of law and *vis-a-vis* the initiative ordinance, invalid and unenforceable.

IV.

THE CORRECTNESS OF THE PALACIO DECISION

Both the residents and the Commission, as an amicus, have challenged the correctness of *Palacio*, an opinion

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[17] The residents, in particular, have expended a great deal of energy in explaining the "evils" of debt service cost allowance provisions in rent control laws. It may well be, as the residents contend, that such allowance provisions can operate over time to "undo" the very protections which rent control laws are designed to provide. (Whether or not such provisions *would* operate in that fashion in any one particular case is problematic.) However, and even assuming the fullest measure of validity for the residents' contention, the courts do not exist to provide remedies for legislative shortsightedness. Legislative bodies themselves have the power to remedy such a deficiency.

upon which the trial court admittedly relied heavily in determining to issue the writ in El Dorado's favor.

The arguments asserted in this regard are, in large part, the same arguments which this court addressed in deciding *Palacio*. Having reviewed the matter, we conclude that *Palacio*, as to both its published and non-published portions, was correctly decided. However, in the interest of laying to rest a number of concerns expressed by both the residents and the Commission, we make the following comments concerning *Palacio*:

(1) *Palacio* does *not* stand for the proposition that any landlord holding rental properties within the city which were purchased with a loan predating the repeal of section 101(c)(1)(xii) is entitled to apply for a debt service cost "pass through" rent increase. *Palacio* applies only to debt service costs incidental to rental property purchase loans which were initially "assumed" or "undertaken" during that relatively short period of time while section 101(c)(1)(xii) was in effect. (*Palacio, supra*, 209 Cal.App.3d at p. 120.)

(2) Consistent with the immediately preceding comment, *Palacio* does *not* apply to any "refinancing" which is carried out following the repeal date of section 101(c)(1)(xii). Any such refinance debt burden would have been "assumed" *after* section 101(c)(1)(xii) ceased to be effective.

(3) Contrary to the contentions of the residents and the Commission, *Palacio* does not conflict with the established understanding of "vested rights" which exists in California. Our Supreme Court had recent occasion in *City of West Hollywood* v. *Beverly Towers, Inc.* (1991) 52

Cal.3d 1184 to examine the concept of "vested rights" in the context of condominium conversions under the Subdivision Map Act. In that case, the Supreme Court reasoned that "principles of fairness" require that a developer's "investments and expectations" be safeguarded as of that point in time when the local governmental agency has performed its final act of discretion in approving the developer's project. (*Id.*, at p. 1190.) So, too, in this case, do principles of fairness require that El Dorado's investment (reflected by El Dorado's having assumed an irrevocable loan repayment obligation) and expectation (that the city's professed concern that landlords be able to receive a "fair" financial return (see fn. 4, *ante*) would remain constant) be safeguarded from legislative repeals occurring after the Commission had performed its final discretionary acts. As we discuss in the next following section of this opinion (Part V.), the Commission concedes (essentially) that its discretionary review and evaluation of El Dorado's application for a debt service cost "pass through allowance" resulted in a determination in El Dorado's *favor*, and that it was only the city's repeal of section 101(c)(1)(xii) which compelled the Commission's denial of that cost allowance.[18] This

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[18] We do not mean to suggest that the Commission had much in the way of discretion insofar as reviewing and evaluating El Dorado's application was concerned. As we discussed in detail in Part II of the *Palacio* decision, the Guidelines are mandatory in nature and the Commission is bound to follow the formulaic requirements of the Guidelines in ruling on rent increase applications. In that unpublished portion of *Palacio*, we said: "The Commission serves a valuable discretionary function in receiving and weighing evidence in support of applications for rent increases. The Commission then has the obligation to

denial violated El Dorado's "vested right" to allocate the service cost of its purchase debt to the residents under section 101(c)(1)(xii).

V.

JUDICIAL USURPATION OF ADMINISTRATIVE DISCRETION

Finally, the residents and the Commission argue that the trial court exceeded its authority under section 1094.5, subdivision (f), of the Code of Civil Procedure by issuing a writ of mandate that controls the discretion legally vested in the Commission. The residents and the Commission base this argument on the fact that the trial court's writ directs the Commission to reach certain conclusions concerning El Dorado's application for a hardship rent increase.

While it is true that the courts have no authority to control or otherwise direct the exercise of lawful discretion lodged in an administrative body, that general observation has no application in this case. In this case, the trial court merely took the "numbers" which the Commission had found to be operative with respect to El Dorado's application for a hardship rent increase (numbers which are not in dispute), inserted those numbers in the mandatory, formulaic matrices established by the Guidelines, and arrived at a final mathematical conclusion as to the level of hardship rent increase allowable under the Guidelines. In short, there was no "discretion" to be

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ministerially apply the Guidelines to the evidence in each instance." (Emphasis added.)

exercised by the Commission with respect to the matters addressed in the trial court's writ of mandate.

This lack of remaining discretion is particularly clear with respect to the issue of the "pass through" of debt service costs. In its final decision, the Commission *conceded* that the Guidelines, if they were understood to include section 101(c)(1)(xii), required the full amount of the "pass through" requested by El Dorado: "If this provision of the guidelines [section 101(c)(1)(xii)] had not been repealed by the City Council, petitioner would have met the required conditions."

The trial court's writ of mandate does not unlawfully intrude upon the vested discretion of the Commission.

DISPOSITION

The trial court's order and writ are affirmed in full.

CERTIFIED FOR PARTIAL PUBLICATION.

TIMLIN
J.

We concur:

RAMIREZ
P.J.

MC DANIEL
J.*

* Retired Associate Justice of the Court of Appeals sitting under assignment by the Chairperson of the Judicial Council.